

13-2894-cr (L)

United States of America v. Prado

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4
5 August Term, 2015
6

7 (Argued: December 9, 2015

Decided: February 24, 2016)

8
9 Docket Nos. 13-2894-cr (L), 13-3877-cr (Con), 14-115-cr (Con), 14-143-cr (Con)
10

11
12
13 UNITED STATES OF AMERICA,
14

15 *Appellee,*

16 v.
17

18 GIOVANNI PRADO, aka JOKER, ERICK ALVARADO, aka GATO SECO,
19 ELENILSON ORTIZ, aka SHORTY, EFRAIN ZUNIGA, aka PANICO, DIEGO
20 NINOS, aka VENENO, aka MICO, SERGIO MEJIA-BARRERA, aka PELON,
21 EMILIO SABALLOS, aka CABALLO, WALTER FLORES-REYES, aka SCRAPPY,
22 aka WALTER REYES, DAVID VALLE, aka OREO, LOUIS RUIZ, aka CHUCKY,
23 aka LUIS RUIZ, FRANCISCO RAMOS, aka CRUISER, CESAR LANDAVERDE,
24 aka FLACO, aka REBELDE, ROGER ALVARADO, aka MICHICHI, CARLOS
25 MARTINEZ, aka CARLITO, JOSE GUSTAVO ORELLANA-TORRES, aka
26 DIABLITO, aka GUSTAVO JEFFERSON ORELLANA TORRES, JIMMY SOSA,
27 aka JUNIOR, JEREMIAS EXEQUIEL AMAYA, aka PAYASO, JOSE SALAZAR
28 ERAZO, aka JOSE SALAZAR ERZAO, FRANKLIN VILLATORO, aka
29 MONSTRO, WILBER AYALA-ARDON, aka PAJARO, aka PIOLIN, YOBANY
30 CALDERON, aka TEGO, ADALBERTO ARIEL GUZMAN, aka GRINGO, RENE
31 MENDEZ MEJIA, aka ZORRO, YONIS ACOSTA-YANES, aka BRUJITA,
32

1 *Defendants,*

2 VIDAL ESPINAL, aka DEMENTE, MARIO ALPHONSO HERRERA-
3 UMANZOR, aka PERDIDO, aka MARIO UMANZOR, HERIBERTO
4 MARTINEZ, aka BOXER, CARLOS ORTEGA, aka SILENCIO,

5
6 *Defendants-Appellants.*¹
7

8
9
10 Before: CALABRESI, POOLER, and LYNCH, *Circuit Judges*.
11

12 Appeal from United States District Court for the Eastern District of New
13 York (Joseph F. Bianco, J.) convicting defendant-appellant Heriberto Martinez,
14 aka Boxer, of fourteen counts related to racketeering activity and three murders
15 in aid of racketeering and convicting defendant-appellant Carlos Ortega, aka
16 Silencio, of twelve counts related to racketeering activity and two murders and
17 one attempted murder in aid of racketeering, following a jury trial. In particular,
18 both defendants were convicted of Count 21, which charged that they
19 “knowingly and intentionally use[d] and carr[ied] a firearm during and in
20 relation to one or more crimes of violence, to wit:” the murder of and conspiracy
21 to murder Mario Alberto Canton Quijada “charged in Counts Nineteen and
22 Twenty, and did knowingly and intentionally possess said firearm in furtherance

¹ The Clerk of Court is directed to amend the caption as set forth above.

1 of such crimes of violence,” or that they aided and abetted that crime. Ortega
2 App’x at 35-36. Because the jury instructions on Count 21 were plainly erroneous
3 and Ortega’s substantial rights were affected, we vacate his conviction on Count
4 21, and remand for resentencing. Although the instructions were also plainly
5 erroneous as to Martinez, his substantial rights were not affected, and we
6 therefore affirm his conviction on Count 21. In a summary order issued
7 simultaneously with this opinion, we affirm Martinez’s and Ortega’s remaining
8 counts of conviction; we grant counsel for defendant-appellant Vidal Espinal’s
9 motion to be relieved, dismiss Espinal’s appeal of his conviction and term of
10 imprisonment, and affirm his special assessment and term of supervised release;
11 and we grant counsel for Mario Alphonso Herrera-Umanzor’s motion to be
12 relieved and we affirm the judgment against Herrera-Umanzor.

13 The judgment against Martinez is affirmed. The judgment against Ortega
14 is vacated in part and affirmed in part, and we remand for resentencing.

1 ROBERT A. SOLOWAY, Rothman, Schneider, Soloway
2 & Stern, LLP, New York, NY, *for Defendant-Appellant*
3 *Mario Alphonso Herrera-Umanzor.*

4
5 JOHN FREDERICK CARMAN, Garden City, NY, *for*
6 *Defendant-Appellant Vidal Espinal.*

7
8 RANDALL D. UNGER, Bayside, NY (Elizabeth E.
9 Macedonio, New York, NY, *on the brief*), *for Defendant-*
10 *Appellant Heriberto Martinez.*

11
12 ELIZABETH M. JOHNSON (Ira D. London and Avrom
13 Robin *on the brief*), Law Offices of London & Robin,
14 New York, NY, *for Defendant-Appellant Carlos Ortega.*

15
16 JOHN J. DURHAM, Assistant United States Attorney
17 (Carrie N. Capwell, Peter A. Norling, and Raymond A.
18 Tierney, Assistant United States Attorneys, *on the brief*),
19 *for Kelly T. Currie, Acting United States Attorney for*
20 *the Eastern District of New York, Brooklyn, NY, for*
21 *Appellee.*

22
23 POOLER, *Circuit Judge:*

24 This appeal concerns the jury instructions given with respect to Count 21
25 of the indictment, which charged defendants-appellants Heriberto Martinez, aka
26 Boxer, and Carlos Ortega, aka Silencio, with aiding and abetting a violation of 18
27 U.S.C. § 924(c), using or carrying a firearm in relation to a crime of violence or
28 possessing a firearm in furtherance of that crime, in connection with the murder

1 of Mario Alberto Canton Quijada. We hold that, in the wake of *Rosemond v.*
2 *United States*, 134 S. Ct. 1240 (2014), general instructions on aiding and abetting
3 liability, such as the instructions given below, are insufficient and plainly
4 erroneous in the context of a § 924(c) charge. We further hold that this error
5 affected Ortega's, but not Martinez's, substantial rights, and we therefore vacate
6 Ortega's conviction on Count 21.

7 BACKGROUND

8 I. The Offense Conduct

9 Martinez and Ortega were members of La Mara Salvatrucha, also known
10 as MS-13, which is a violent international street gang. Martinez was the leader of
11 the Coronados Locos Salvatruchas ("CLS"), a clique, or subgroup, of MS-13 that
12 controlled the Brentwood area of Long Island. Ortega belonged to an MS-13
13 clique called Sitios Locos Salvatruchas ("STLS"), which is based in El Salvador.

14 Martinez was indicted on fourteen counts related to racketeering activity
15 and three murders committed in aid of racketeering; Ortega was indicted on
16 twelve counts related to racketeering activity, two murders, and one attempted
17 murder committed in aid of racketeering. Following a jury trial, both defendants

1 were convicted of every count with which they were charged. As is relevant
2 here, Martinez and Ortega were both convicted of Count 21, which charged them
3 with knowingly and intentionally using and carrying a firearm in relation to the
4 murder of Quijada, or aiding and abetting the same, under 18 U.S.C. § 924(c) and
5 18 U.S.C. § 2. Each defendant was sentenced to life plus a consecutive 60 years;
6 25 of those additional 60 years were allocated, as required by 18 U.S.C. §
7 924(c)(1)(C)(i), to their convictions on Count 21.

8 The evidence presented at trial as to Count 21 and the murder of Quijada
9 was as follows. On March 16, 2010, a group of MS-13 members, including
10 Martinez and Ortega, met at the home of Jeremias Amaya, aka Payaso, to discuss
11 Quijada, aka Baby Blue. Quijada was also a member of MS-13, specifically the
12 Surenos Locos Salvatruchas (“SLS”) clique. The group discussed that Quijada
13 “wasn’t running properly,” that he “was no good for the Mara because he only
14 caused problems,” and that he “only caused problems and never solved a thing.”
15 Tr. at 1223-24. Because of these problems, the MS-13 members present decided
16 that they would require Quijada to kill a rival gang member to prove himself.

1 Thereafter, a group of MS-13 members, including Ortega, picked up
2 Quijada. There is conflicting testimony as to whether Martinez also accompanied
3 the group on this "mission." They drove around looking for rival gang members
4 for Quijada to kill, but were unable to find any. Quijada was dropped off at
5 home and the rest of the group returned to Amaya's home. There, Ortega "said
6 that he had wanted to give [Quijada] the gun, but [Quijada] didn't want to pick it
7 up." Tr. at 1776. According to one cooperating witness, upon returning, the
8 group, including Ortega and Martinez, discussed that Quijada "had to be
9 eliminated," meaning "[k]ill[ed]," because he "only brought or caused problems
10 and . . . he was not there to help the [gang]." Tr. at 1227. According to that
11 witness, the group then took a vote, and unanimously voted to pick Quijada up
12 and kill him. Another cooperating witness testified that Ortega said they had to
13 kill Quijada, and Martinez stated that he agreed because if Quijada were arrested
14 he would snitch. By contrast, the testimony of a third cooperating witness, who
15 was not present at that meeting, indicated that the decision to murder Quijada
16 was not made until immediately before the murder. Specifically, he testified that
17 shortly after the murder of Quijada, Ortega told him that when Quijada refused

1 to commit a murder on behalf of the gang, they “had a quick meeting and they
2 had decided to give him a calenton,” Tr. at 406, a beating the gang uses for
3 initiation and punishment. But, Ortega told him, “when they started giving him
4 the calenton they decided to shoot him” instead. Tr. at 406.

5 Following that meeting, one of the MS-13 members present called Quijada
6 and told him that they were coming to pick him up because they had found some
7 rival gang members. A group of five MS-13 members, including both Martinez
8 and Ortega, then went to pick up Quijada. The group left Amaya’s house, and
9 then spent approximately ten to fifteen minutes in the parking lot outside before
10 going to get Quijada. A cooperating witness testified that he could see the car
11 sitting in the parking lot from the apartment he was in. He stated, “I don’t know
12 what they were doing. I think they were loading the gun.” Tr. at 1778. When
13 police later searched the car, officers found a bag containing dozens of bullets.

14 The group went to get Quijada, and brought him to the beach. According
15 to one cooperating witness, before leaving for the beach, Martinez grabbed a
16 machete that was in Amaya’s house. At the beach, Amaya took out a gun to
17 shoot Quijada, but the gun jammed. Amaya handed the gun to Martinez, and

1 Martinez gave Amaya the machete, which Amaya then used to stab Quijada.
2 Amaya told one cooperating witness that, while he was stabbing Quijada, the
3 other MS-13 members present were supporting him. Another MS-13 member
4 then stabbed Quijada with a kitchen knife. Quijada was ultimately stabbed to
5 death. Additionally, Martinez gave a statement to police on March 17, 2010, the
6 day after the murder, stating that, after the gun failed, they used a machete and a
7 knife to murder Quijada and that he had brought the machete to the beach.
8 Martinez further stated that after the gun jammed, he hit Quijada with the
9 machete at one point, and that he kicked Quijada so that he fell and was not able
10 to get away. By contrast, there is no evidence that Ortega participated in the
11 assault on and murder of Quijada after the gun appeared.

12 Finally, there was evidence that the gun Amaya tried to shoot Quijada
13 with, a .22 caliber gun, was the same gun Ortega had tried to give Quijada earlier
14 that night. There was also evidence that that gun belonged to Martinez's clique.

1 **II. Count 21**

2 **A. The Charge**

3 Count 21 charged Martinez and Ortega with brandishing a firearm during
4 a crime of violence in connection with the murder of Quijada. The indictment
5 charged them with 18 U.S.C. § 924(c)(1)(A)(ii), (c)(1)(C) and 18 U.S.C. § 2. The
6 charged provisions of 18 U.S.C. § 924(c) provide that

7 any person who, during and in relation to any crime of violence or
8 drug trafficking crime (including a crime of violence or drug
9 trafficking crime that provides for an enhanced punishment if
10 committed by the use of a deadly or dangerous weapon or device)
11 for which the person may be prosecuted in a court of the United
12 States, uses or carries a firearm, or who, in furtherance of any such
13 crime, possesses a firearm, shall, in addition to the punishment
14 provided for such crime of violence or drug trafficking crime-- . . . if
15 the firearm is brandished, be sentenced to a term of imprisonment of
16 not less than 7 years In the case of a second or subsequent
17 conviction under this subsection, the person shall-- . . . be sentenced
18 to a term of imprisonment of not less than 25 years

19
20 18 U.S.C. § 924(c)(1)(A)(ii), (c)(1)(C). And 18 U.S.C. § 2(a), the federal aiding and
21 abetting statute, provides that “[w]hoever commits an offense against the United
22 States or aids, abets, counsels, commands, induces or procures its commission, is
23 punishable as a principal.”

1 **B. The Jury Instructions**

2 The district court first gave the jury a general instruction on aiding and
3 abetting liability:

4 Certain counts charge the defendants with violating the
5 “aiding and abetting statute.” The federal definition of “aiding and
6 abetting” is contained in section two of Title 18 of the United States
7 Code, which provides – I’m now reading from the statement [sic]:
8

9 A. Whoever commits an offense . . . or aids, abets, counsels,
10 commands, induces or procures its commission, is punishable as a
11 principal.
12

13 B. Whoever willfully causes an act to be done, which if
14 directly performed by him or another would be an offense against
15 the United States, is punishable as a principal.
16

17 Under this statute, it is not necessary for the Government to
18 show that the defendant himself physically committed the crime
19 with which he is charged in order for you to find him guilty. This is
20 because under the law, a person who aids or abets another to
21 commit an offense is just as guilty of that offense as if he committed
22 it himself.
23

24 Before a defendant may be held responsible for aiding and
25 abetting others in the commission of a crime, it is necessary that the
26 Government prove beyond a reasonable doubt that the defendant
27 knowingly and deliberately associated himself in some way with the
28 crime charged and participated in it with the intent to commit the
29 crime.
30

1 In order to be found guilty of aiding and abetting the
2 commission of a crime, the Government must prove beyond a
3 reasonable doubt that the defendant:

4
5 First, knew that the crime charged was to be committed or
6 was being committed;

7
8 Second, knowingly did some act for the purpose of aiding,
9 commanding or encouraging the commission of that crime; and

10
11 Third, acted with the intention of causing the crime charged to
12 be committed.

13
14 Before the defendant may be found guilty as an aider or an
15 abettor to the crime, the Government must also prove beyond a
16 reasonable doubt that someone committed each of the essential
17 elements of the offense charged, as detailed for you in the
18 instructions for the crime the defendant is alleged to have . . . aided
19 and abetted.

20
21 Merely being present at the scene of the crime, or merely
22 knowing that the crime is being committed or is about to be
23 committed, is not sufficient conduct for the jury to find that a
24 defendant aided and abetted the commission of that crime.

25
26 The Government must prove that the defendant knowingly
27 and deliberately associated himself with the crime in some way as a
28 participant, someone who wanted the crime to be committed, not as
29 a mere spectator.
30

1 Tr. at 3327-29. With respect to Section 924(c), the district court gave the following
2 instructions regarding a charge against Martinez in connection with a different
3 murder:

4 Section 924(c) of Title 18 of the United States Code provides in
5 pertinent part:

6
7 Any person who during and in relation to any crime of
8 violence or drug trafficking crime for which the person may be
9 prosecuted in a court of the United States, uses or carries a firearm,
10 or who in furtherance of any such crime possesses a firearm, shall be
11 guilty of a crime.

12
13 In order to prove the crime charged in [this count], the
14 government must establish the following two elements beyond a
15 reasonable doubt:

16
17 First, that the defendant committed a crime of violence;

18
19 And second, that the defendant either knowingly and
20 intentionally used or carried a firearm during and in relation to the
21 commission of the crime of violence, or knowingly and intentionally
22 possessed a firearm in furtherance of that crime, or aided and
23 abetted another person doing so.

24
25 [This count] also charges the defendant with violating Section
26 2 of Title 18 of the United States Code, that is with aiding and
27 abetting the violation of Section 924(c) of Title 18 of the United States
28 Code. In determining whether or not a defendant is guilty as an
29 aider and abettor, you should follow the instructions I have briefly
30 given you.

1 . . .

2
3 To prove that the firearm was used or carried during and in
4 relation to the commission of a crime of violence, the government
5 must prove that it was an integral part of the commission of the
6 crime and that it furthered or facilitated the crime; it is not sufficient
7 if the carrying was inadvertent, coincidental, or for some purpose
8 other than furthering or facilitating the crime.

9
10 . . .

11
12 To possess a firearm in furtherance of a crime means that the
13 firearm helped forward, advance or promote the commission of the
14 crime. The mere possession of the firearm at the scene of the crime is
15 not sufficient. The firearm must have played some part in furthering
16 the crime.

17
18 Tr. at 3390-94. Later, addressing Count 21, the court instructed:

19 Now, Count 21: Use of a firearm, also charged with aiding
20 and abetting.

21
22 Count 21 charges the defendants Martinez and Ortega with
23 the unlawful use of a firearm in connection with Counts 19 and 20
24 [which are the conspiracy to murder Quijada and the murder of
25 Quijada for purposes of maintaining and increasing position in the
26 MS-13].

27
28 Count 21 reads as follows:

29
30 [] On or about March [17], 2010,² within the Eastern District of
31 New York, the defendant Heriberto Martinez, also known as

² The district court initially stated “March 6, 2010,” but then corrected itself, stating, “There was an error. When I read you the indictment I . . . said on or

1 “Boxer,” and Carlos Ortega, also known as “Silencio” and “Silent,”
2 together with others, did knowingly and intentionally use and carry
3 a firearm during and in relation to one or more crimes of violence, to
4 wit: the crimes charged in Counts 19 and 20, and did knowingly and
5 intentionally possess said firearm in furtherance of such crimes of
6 violence, which firearm was brandished.

7
8 I have previously instructed you on the law concerning the
9 use of a firearm during a crime of violence. Again, those instructions
10 apply equally here.

11
12 Count 21 also charges the defendants with violating Section 2
13 of the United States code; that is, with aiding and abetting the
14 violation of Section 924(c) of Title 18 of the United States Code.

15
16 In determining whether a defendant is guilty as an aider and
17 abettor, you should follow the instructions that I have previously
18 given you.

19
20 Tr. at 3432-33.

21 DISCUSSION

22 I. Standard of Review

23 “We review challenges to jury instructions *de novo* but will reverse only
24 where the charge, viewed as a whole, demonstrates prejudicial error.” *United*
25 *States v. Rivera*, 799 F.3d 180, 186 (2d Cir. 2015) (internal quotation marks
26 omitted). “A jury instruction is erroneous if it misleads the jury as to the correct
about March 6th. The indictment says on or about March 17th, which is correct.”
Tr. at 3434.

1 legal standard or does not adequately inform the jury on the law.” *United States*
2 *v. Bahel*, 662 F.3d 610, 634 (2d Cir. 2011) (internal quotation marks omitted).

3 Generally speaking, if a defendant did not object to the instruction, a “plain error
4 standard of review applies.” *United States v. Botti*, 711 F.3d 299, 308 (2d Cir. 2013).

5 Under that standard, “an appellate court may, in its discretion, correct an error
6 not raised at trial only where the appellant demonstrates that (1) there is an error;
7 (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the
8 error affected the appellant’s substantial rights, which in the ordinary case means
9 it affected the outcome of the district court proceedings; and (4) the error
10 seriously affects the fairness, integrity or public reputation of judicial
11 proceedings.” *United States v. Marcus*, 560 U.S. 258, 262 (2010) (alterations and
12 internal quotation marks omitted).

13 **II. The Jury Instructions were Plainly Erroneous**

14 Following the trial and the district court’s ruling on the defendants’ post-
15 trial motions, the Supreme Court decided *Rosemond v. United States*, 134 S. Ct.
16 1240 (2014). Rosemond, the defendant, was convicted of aiding and abetting a
17 violation of 18 U.S.C. § 924(c). The district court instructed, with respect to 18

1 U.S.C. § 2, that “[a] person who aids or abets another to commit an offense is just
2 as guilty of that offense as if he committed it himself. And in order to aid or abet,
3 the defendant must willfully and knowingly associate himself in some way with
4 the crime, and seek by some act to help make the crime succeed.” *Id.* at 1244
5 (citation, alterations, and internal quotation marks omitted). When discussing
6 § 924(c) specifically, the district court instructed the jury “that it could convict if
7 (1) the defendant knew his cohort used a firearm in the drug trafficking crime,
8 and (2) the defendant knowingly and actively participated in the drug trafficking
9 crime.” *Id.* (internal quotation marks omitted).

10 The Supreme Court vacated Rosemond’s conviction, holding that the jury
11 instructions were erroneous. The Court ruled that “[a]n active participant in a
12 drug transaction has the intent needed to aid and abet a § 924(c) violation when
13 he knows that one of his confederates will carry a gun. In such a case, the
14 accomplice has decided to join in the criminal venture, and share in its benefits,
15 with full awareness of its scope—that the plan calls not just for a drug sale, but
16 for an armed one.” *Id.* at 1249. “For all that to be true . . . the § 924(c) defendant’s
17 knowledge of a firearm *must be advance knowledge—or otherwise said, knowledge*

1 *that enables him to make the relevant legal (and indeed, moral) choice.” Id.* (emphasis
2 added). “[W]hen an accomplice knows nothing of a gun until it appears at the
3 scene, he may already have completed his acts of assistance; or even if not, he
4 may at that late point have no realistic opportunity to quit the crime. And when
5 that is so, the defendant has not shown the requisite intent to assist a crime
6 involving a gun.” *Id.* Thus, the Court concluded, “[w]hat matters for purposes of
7 gauging intent, and so what jury instructions should convey, is that the
8 defendant has chosen, with full knowledge, to participate in the illegal scheme.”
9 *Id.* at 1250.

10 “Under these principles,” the Supreme Court concluded, “the District
11 Court erred in instructing the jury, because it did not explain that Rosemond
12 needed advance knowledge of a firearm’s presence.” *Id.* at 1251. The Court found
13 error because “[i]n telling the jury to consider merely whether Rosemond ‘knew
14 his cohort used a firearm,’ the court did not direct the jury to determine *when*
15 Rosemond obtained the requisite knowledge. So, for example, the jury could
16 have convicted even if Rosemond first learned of the gun when it was fired and
17 he took no further action to advance the crime.” *Id.* at 1251-52. The Court

1 emphasized that the jury must be instructed that Rosemond “had to have
2 advance knowledge, of the kind . . . described, that a confederate would be
3 armed.” *Id.* at 1252. The Supreme Court also rejected the government’s argument
4 that the instruction “looks more accurate when viewed in context,” referring to
5 the “umbrella instruction that to aid or abet a crime, a defendant must willfully
6 and knowingly seek by some act to help make the crime succeed.” *Id.* (alteration
7 and internal quotation marks omitted). The Court rejected this rationale because
8 that statement “is . . . pitched at a high level of generality” and was immediately
9 followed by the “two-pronged test noted above,” and therefore the umbrella
10 statement could not “have cured the court’s error.” *Id.*

11 In the wake of *Rosemond*, two circuits, the Sixth and the Tenth, have
12 considered whether umbrella aiding and abetting instructions like those given in
13 the court below are plainly erroneous, and have come to different conclusions.
14 The Sixth Circuit has rejected jury instructions that require a finding only of
15 intent to further the predicate crime, not the use of the gun, and where “[t]he
16 court never instructed the jury that [the defendant] had to have *advance knowledge*
17 that a (real) firearm would be used.” *United States v. Henry*, 797 F.3d 371, 374 (6th

1 Cir. 2015) (holding the jury instructions erroneous because they permitted the
2 jury to convict the defendant of violating Section 924(c) “merely because he
3 ‘intend[ed] to help commit or to encourage’ the predicate offense—the bank
4 robbery—without ever finding that he had the requisite intent and advance
5 knowledge related to his compatriot’s firearm possession”); *see also United States*
6 *v. Richardson*, 793 F.3d 612, 631 (6th Cir. 2015) (holding jury instructions
7 erroneous where, under a natural reading, they required the jury to find only
8 that the defendant intended to help commit the predicate robbery crime because
9 they “insufficiently explain[ed] the knowledge requirement necessary to convict
10 [the defendant] of aiding and abetting a § 924(c) violation”).

11 By contrast, the Tenth Circuit found jury instructions not plainly erroneous
12 where the instructions stated that the government must prove that the
13 “defendant intentionally associated himself in some way with the crime and
14 intentionally participated in it as he would in something he wished to bring
15 about,” meaning that he “*consciously shared the other person’s knowledge of the*
16 *underlying criminal act and intended to help him or her.*” *United States v. Davis*, 750
17 F.3d 1186, 1192 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 989 (2015). Although the

1 Tenth Circuit noted that “[a]fter *Rosemond*, a jury instruction on aiding and
2 abetting § 924(c) should address the defendant’s advance knowledge of the gun,”
3 and the jury instructions in that case failed to “highlight this point in relation to
4 the § 924(c) offense,” it nonetheless held that the blanket aiding and abetting
5 instruction did not fail on plain error review. *Id.* at 1193. Instead, the Tenth
6 Circuit held that “the general aider-and-abettor instruction did require [the
7 defendant] to consciously share [his confederate’s] knowledge of the § 924(c)
8 offense and that is enough on a plain error challenge.” *Id.*

9 The instructions given here fall somewhere between those rejected by the
10 Sixth Circuit and those accepted by the Tenth Circuit. Here, the jury was
11 instructed that, in order to convict, it must find that the defendants intended to
12 commit the charged crime, not just the predicate offense, but there was no
13 instruction that the jury was required to find that they consciously shared the
14 knowledge of the principal. We conclude that these instructions are erroneous
15 under *Rosemond* because they provide no instruction that the jury must find that
16 the defendants had *advance knowledge* of the gun at a time that they could have
17 chosen not to participate in the crime. The instructions thus permitted the jury to

1 convict defendants of the crime even if they “kn[ew] nothing of a gun until it
2 appear[ed] at the scene,” and even if, at the time they learned about the gun, they
3 had already completed their assistance or had “at that late point no realistic
4 opportunity to quit the crime.” *Rosemond*, 134 S. Ct. at 1249. Indeed, in *Rosemond*,
5 the district court specifically instructed that the jury must find that the defendant
6 had knowledge of the firearm, *id.* at 1244, but the Supreme Court nonetheless
7 found this instruction insufficient because it failed to emphasize *when* the
8 knowledge arose. And, the Supreme Court held, this lack of emphasis on the
9 timing was not rectified by the blanket instruction that “to aid or abet a crime, a
10 defendant must willfully and knowingly seek by some act to help make the
11 crime succeed.” *Id.* at 1252 (alteration and internal quotation marks omitted).
12 Similarly, here, the blanket aiding and abetting instruction requiring a finding of
13 intent to commit the crime does not cure the failure to require the jury to find
14 that defendants had advance knowledge of the firearm. We therefore hold this
15 jury instruction to be plainly erroneous.

1 **III. Remedy**

2 Having found that the jury instructions were plainly erroneous, we next
3 address whether the error affected Martinez’s and Ortega’s substantial rights. To
4 satisfy this requirement, “an appellant must demonstrate that the error was
5 prejudicial.” *United States v. Marcus*, 628 F.3d 36, 42 (2d Cir. 2010). “In the
6 ordinary case, an error is prejudicial where there is a ‘reasonable probability that
7 the error affected the outcome of the trial.’” *Id.* (quoting *Marcus*, 560 U.S. at 262).

8 The Second Circuit has previously employed a “modified plain error” rule
9 where an error results from a supervening change in law. In *United States v. Viola*,
10 35 F.3d 37 (2d Cir. 1994), *abrogated on other grounds by Salinas v. United States*, 522
11 U.S. 52 (1997), we held that “[w]hen a supervening decision alters settled law, the
12 three . . . conditions for reviewing plain error under Rule 52(b) still must be met,
13 but with one crucial distinction: the burden of persuasion as to prejudice (or,
14 more precisely, lack of prejudice) is borne by the government, and not the
15 defendant.” *Id.* at 42. However in *Johnson v. United States*, 520 U.S. 461 (1997), the
16 Supreme Court addressed that scenario and applied the plain error rule, not the
17 modified plain error rule. *Id.* at 469-70. Following *Johnson*, this Court has

1 expressed doubt regarding the continued viability of the modified plain error
2 rule, but has, to this point, declined to address the issue head on. *See, e.g., United*
3 *States v. George*, 779 F.3d 113, 117 n.2 (2d Cir. 2015) (declining to address
4 “whether the modified plain error standard remains viable in light of *Johnson*”);
5 *Botti*, 711 F.3d at 309-10. Because the outcome is the same regardless of whether
6 the government or defendants bear the burden of persuasion, we need not decide
7 definitively here whether *Johnson* sounded the modified plain error rule’s death
8 knell.

9 Even if an error in jury instructions affected defendants’ substantial rights,
10 vacating and remanding the convictions on the count in question is not
11 automatic. *See* Fed. R. Crim. P. 52(b) (“A plain error that affects substantial rights
12 *may* be considered even though it was not brought to the court’s attention.”
13 (emphasis added)). That is, if the jury “instruction contains (1) error, (2) that is
14 plain, and (3) that affects substantial rights . . . a court may exercise its discretion
15 to correct the error only if the error seriously affected the fairness, integrity or
16 public reputation of judicial proceedings.” *Botti*, 711 F.3d at 308 (brackets,
17 alterations, and internal quotation marks omitted). “An error may ‘seriously

1 affect the fairness, integrity or public reputation of judicial proceedings’
2 independent of the defendant’s innocence.” *United States v. Olano*, 507 U.S. 725,
3 736-37 (1993). “Conversely, a plain error affecting substantial rights does not,
4 without more, satisfy [this requirement], for otherwise the discretion afforded by
5 Rule 52(b) would be illusory.” *Id.* at 737. In applying this final requirement, the
6 Supreme Court has “suggested that, in most circumstances, an error that does
7 not affect the jury’s verdict does not significantly impugn the fairness, integrity,
8 or public reputation of the judicial process.” *Marcus*, 560 U.S. at 265-66 (internal
9 quotation marks omitted). *See also United States v. Nouri*, 711 F.3d 129, 140 (2d Cir.
10 2013) (“If the evidence bearing on the omitted element is overwhelming and
11 essentially uncontroverted, there is no basis for concluding that the error
12 seriously affects the fairness, integrity, or public reputation of judicial
13 proceedings.” (internal quotation marks omitted)).

14 **A. Ortega**

15 The question here is whether, had the jury been properly instructed that it
16 was required to find that Ortega joined in the criminal venture with full
17 knowledge of its scope, including with advance knowledge of the gun at a time

1 Ortega could have withdrawn from the scheme, there is a reasonable probability
2 that the jury would have acquitted Ortega on this count. *Cf. United States v.*
3 *Robinson*, 799 F.3d 196, 201 (2d Cir. 2015) (holding that the defendant’s plea to a
4 charge of aiding and abetting a violation of § 924(c) had a sufficient factual basis
5 in light of *Rosemond*, based on the defendant’s concession during the plea
6 colloquy that he “had a chance to ‘turn[] and run[] the other way’ but did not”
7 upon learning that his confederate was using a gun during a carjacking
8 (alterations in original)).

9 As discussed above, there is evidence that Ortega was in possession of a
10 gun earlier on the day of the murder when he, with others, took Quijada on a
11 mission to find rival gang members to kill. In particular, a cooperating witness
12 testified that, upon their return, Ortega “said that he had wanted to give
13 [Quijada] the gun, but [Quijada] didn’t want to pick it up.” Tr. at 1776. Further,
14 there was evidence that the gun Ortega had earlier in the day was the same gun
15 Amaya later used to attempt to shoot Quijada. A cooperating witness testified
16 that when the group took Quijada out to search for rival gang members, they
17 carried a silver .22 caliber handgun, which belonged to CLS, Martinez’s clique.

1 Another cooperating witness testified that the .22 caliber gun Amaya used at the
2 beach was the same weapon that Quijada was supposed to use against the rival
3 gang members.

4 However, there is no direct evidence that Ortega knew, upon leaving to
5 pick Quijada up the second time, that someone had brought the gun. The only
6 evidence indicating that Ortega knew about the gun was that after the group left
7 Amaya's house, they spent approximately ten to fifteen minutes in the parking
8 lot outside before going to get Quijada. A cooperating witness testified that he
9 could see the car sitting in the parking lot, and stated, "I don't know what they
10 were doing. I think they were loading the gun." Tr. at 1778. However, this is pure
11 speculation. And while officers later found bullets in the car, this does not prove
12 that the cooperating witness's speculation was accurate. Moreover, there is some
13 evidence—though there is much more evidence to the contrary—that, prior to
14 leaving, the defendants had only decided to give Quijada a beating, and that it
15 was not until they were at the beach that they decided to murder him. Finally,
16 there is no evidence that Ortega continued to participate in the crime after the
17 gun appeared on the beach.

1 Thus, because there is very limited evidence of advance knowledge of the
2 gun or of Ortega's participation in the crime after the gun's appearance on the
3 beach, there is a reasonable probability of a different trial outcome had the jury
4 been properly instructed.³ "We also believe, again under these circumstances and
5 for the same reasons, that the error 'seriously affect[ed] the fairness' of the
6 proceeding below and exercise our discretion to correct it, having found the error
7 to satisfy the plain error test." *United States v. Draper*, 553 F.3d 174, 182-83 (2d Cir.
8 2009) (alteration in original) (quoting *Olano*, 507 U.S. at 736). We therefore vacate
9 Ortega's conviction on Count 21.

10 **B. Martinez**

11 The evidence against Ortega in large part also applies to Martinez. There is
12 evidence that Martinez was with Ortega, Quijada, and others, earlier in the day,

³ However, to the extent that Ortega brings a separate sufficiency of the evidence challenge against his conviction on Count 21, this challenge fails. Although there is a substantial possibility that the jury would have come to a different verdict had it been properly instructed, there was certainly sufficient circumstantial evidence that Ortega had foreknowledge of the gun to sustain the conviction. *See Lynch v. Dolce*, 789 F.3d 303, 318 (2d Cir. 2015) (holding that although the "evidence at trial was sufficient to convict," "it was not so overwhelming that there [was] no reasonable possibility that the failure to charge the jury on the possession requirement affected its verdict on that count").

1 when Ortega possessed the gun in question and tried to give it to Quijada,
2 although there is also evidence that Martinez did not accompany them on this
3 mission. Martinez also returned to Amaya's home to discuss Quijada's fate.
4 Before leaving to get Quijada for the second time, Martinez took a machete from
5 Amaya's home. Martinez was also in the car that sat in the parking lot outside
6 Amaya's house for ten to fifteen minutes before leaving to pick up Quijada. And,
7 although there is evidence that the gun belonged to CLS, the clique Martinez was
8 a leader of, there is no evidence that Martinez knew where the gun was at all
9 times.

10 However, unlike against Ortega, there is also direct evidence of Martinez's
11 participation in the murder. At the beach, Amaya took out the gun and
12 attempted to shoot Quijada, but the gun jammed. Martinez gave a statement to
13 police saying that after the gun jammed, he hit Quijada with the machete and
14 that he kicked Quijada so that he fell and could not escape. There is also evidence
15 that, after the gun jammed, Amaya handed the gun to Martinez, and Martinez
16 gave Amaya the machete, which Amaya then used to stab Quijada.

1 As to Martinez, we cannot say that there is a reasonable probability of a
2 different outcome at trial had the jury been properly instructed. The evidence
3 demonstrates that, after the gun appeared, Martinez continued to play an active
4 role in the crime. *See Rosemond*, 134 S. Ct. at 1250 n.9 (noting that a jury could
5 “permissibly infer from [a defendant’s] failure to object or withdraw that he
6 had . . . knowledge” of the gun at a point where he could walk away). Not only
7 did Martinez hit the victim with a machete and kick him so that he could not run
8 away, Martinez handed Amaya the machete, the murder weapon, after Martinez
9 knew that the gun had been brandished and had malfunctioned. Martinez
10 therefore continued to play a pivotal role in the offense, even after he knew that
11 brandishing a firearm had played a part in it. Further, if Martinez had objections
12 to the use of the gun, moral, tactical, or otherwise, as the leader of the clique, he
13 could have called the crime off or ended his participation in it after the gun was
14 brandished and, especially, after the gun jammed. Unlike the potentially
15 unarmed *Rosemond*, who might have suddenly learned in the middle of the
16 drug deal that his accomplice had brought a gun, which might well have been
17 turned on him had he tried to bail out of the crime, the evidence here shows that

1 Martinez was armed with a machete, while his coconspirator Ayala had a non-
2 operable firearm. Rather than opt out of the crime, Martinez traded the machete
3 for the gun. Based on this evidence, there is no reasonable probability of a
4 different trial outcome had the jury been properly instructed. Accordingly, we
5 affirm Martinez's conviction on Count 21.

6 7 **CONCLUSION**

8 For the foregoing reasons, and for the reasons stated in the accompanying
9 summary order, (1) the judgment against Martinez is AFFIRMED, (2) with
10 respect to Ortega, we VACATE his conviction on Count 21, AFFIRM his
11 conviction on all other counts, and REMAND for resentencing, (3) we GRANT
12 attorney John F. Carman's motion to be relieved as counsel to Espinal, we
13 DISMISS Espinal's appeal of his conviction and term of imprisonment, and we
14 AFFIRM his special assessment and term of supervised release, and (4) we
15 GRANT attorney Robert A. Soloway's motion to be relieved as counsel to
16 Herrera-Umanzor and we AFFIRM the judgment against Herrera-Umanzor.